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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1212

INDEPENDENT STAVE COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 15, 1965 pursuant to its opinion filed November 10, 1965.

CITATIONS TO OPINIONS BELOW.

The Trial Examiner's Decision is reported at 148 NLRB 433 and is printed in the Record prepared for the Court of Appeals at pp. 217-230. The Decision and Order of the

National Labor Relations Board, printed in the Record prepared for the Court of Appeals,[1] pp. 233-236, is reported in 148 NLRB 431. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 19, is reported in 352 F. 2d 553.

JURISDICTION.

The judgment and decree of the Court of Appeals was entered December 15, 1965 pursuant to its opinion filed November 10, 1965 (R. 44, 19; pp. 51, 19, *infra*). On February 8, 1966, after due consideration, the Court of Appeals denied petitioner's Petition for Rehearing, leave to file said Petition having previously been granted on January 10, 1966 (R. 61, 50). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

An International union is certified by the National Labor Relations Board to represent a unit of employees at petitioner's only plant, located in outstate Missouri. The International creates a Local union to administer the contracts with the Company and allows it to participate in the bargaining for three successive contracts over the years, on some occasions the Local acting without International representatives present. In 1963, while a new contract is being negotiated the Local and the International disagree as to wage proposals and the International, without notifying the Company of its reasons, withdraws from previously scheduled negotiations allowing the Local to continue them. Subject only to ratification by the employees, the Company and the Local negotiate a new contract involving substantial benefits and concessions by the Company. The day of the scheduled vote by the employees on ratification of the contract, the Company re-

[1] Hereafter cited as "A. R."

ceives a telegram indicating for the first time that the International Executive Board reserves the right to approve any contract which the Local and the Company may enter into. The employees ratify the contract by a vote of 74 to 25. The contract is executed by the Company and the Local. The International Executive Board repudiates the agreement and demands further negotiations. The Company refuses. A Trial Examiner of the National Labor Relations Board rules that the Company has failed to bargain in good faith because whatever authority the Local had, real or apparent, was revoked before execution of the agreement relying in large part on the telegram. The National Labor Relations Board adopts these findings and the Court of Appeals enforces its order. Two questions are presented:

1. May the certified International union, consistently with Section 2 (13) of the National Labor Relations Act, as amended, 29 U. S. C., § 152 (13) and the federal requirements for stable collective bargaining relationships, limit the negotiating authority of its Local after the Local has already reached agreement with the Company on a contract to be submitted to the employees for ratification?

2. Should the Court of Appeals enforce without modification an ambiguous Board order (a) which invalidates the contract for all purposes and is not limited so as to proscribe only the Company's use of that contract to forestall collective bargaining and (b) which nevertheless preserves employee rights under that contract without preserving Company defenses thereto?

STATUTES INVOLVED.

Section 2 (13) of the National Labor Relations Act, as amended (61 Stat. 139, 29 U. S. C., § 152 (13)), provides:

> "In determining whether any person is acting as an 'agent' of another person so as to make such other

person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Section 8 (a) (5) of the National Labor Relations Act, as amended (49 Stat. 452, 29 U. S. C., § 158 (a) (5)), provides:

"(a) It shall be an unfair labor practice for an employer—

• • •

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159 (a) of this title."

Section 9 (a) of the National Labor Relations Act, as amended (49 Stat. 453, 29 U. S. C., § 159 (a)), insofar as it may be pertinent here provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

STATEMENT.

On September 18, 1964, petitioner, Independent Stave Company, Inc., initiated proceedings in the Court of Appeals for the Eighth Circuit to review an order of the National Labor Relations Board[2] requiring it to bargain exclusively upon request with the Coopers International Union of North America, AFL-CIO[3] (the representative of

[2] Hereinafter referred to as the "Board".

[3] Hereinafter referred to as the "International".

its employees according to a Board certification of September, 1955), to cease giving effect to its contract of July 18, 1963 with Local 42 of the Coopers International Union of North America, AFL-CIO,[4] and to take certain ancillary, remedial steps (R. 1, A. R. 227-228, 234-235). This order was based upon findings that the petitioner violated Section 8 (a) (5) and (1) of the National Labor Relations Act,[5] as amended, 29 U. S. C., § 158 (a) (5) and (1), when it executed a collective bargaining agreement with Local 42 and thereafter refused to meet with International representatives who had repudiated that contract (AR. 219-226, 233-234).[6] The Board cross-petitioned for enforcement (R. 17). Since petitioner's principal place of business is located at Lebanon, Missouri where the alleged unfair labor practices occurred (A. R. 108, 218-223), the jurisdiction of the Court of Appeals for the Eighth Circuit was properly invoked pursuant to Section 10 (f) and (e) of the Act, 29 U. S. C., §§ 160 (f) and (e).

Prior to 1963, the parties had negotiated three contracts with terms beginning in 1955, 1957 and 1960 (A. R. 245, 252, 237, 224).

According to the Trial Examiner's findings, adopted by the Board, in the 1963 negotiations the parties met and negotiated on June 26 and July 11 with International and Local representatives present, the International representative having been sent "to assist the Local in negotiations," but they in fact took the lead in the discussions (A. R. 219-20). Negotiations were scheduled to continue on July 12, but the Local officers disagreed with the International Vice-President over wage proposals and as a

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[4] Hereinafter referred to as the "Local" or "Local 42".

[5] Hereinafter referred to as the "Act".

[6] The Complaint did not charge, and the Board did not find, any independent violation of Section 8 (a) (1) of the Act, 29 U. S. C., § 158 (a) (1) (interference, restraint or coercion of employee rights). The Section 8 (a) (1) violation was wholly dependent upon the finding of a refusal to bargain.

result the International Vice-President did not attend the July 12 meeting but instead, after consultation with the International President, told the Local that he would not assist them further (A. R. 220).

On July 12 and July 13 the Company and the Local continued negotiations, substantial concessions were made by the Company and agreement was reached that the union negotiators would take the contract back to the employees for ratification (A. R. 89, 102-3, 110-3, 141, 206-7 (negotiations and concessions); 127, 90-91, 102, 142, 207 (tentative agreement subject to ratification by employees)). Neither the Trial Examiner, the Board nor the Court below made any finding as to whether or not tentative agreement was reached on July 13 subject only to employee ratification, despite petitioner's insistence that such a finding was crucial (E. g., Exceptions, par. 3, A. R. 231; Reply Brief, *infra*, pp. 57-59).[7]

There was considerable testimony that the Local was, in fact, authorized to conduct these negotiations, and although its authority to vary from the International's wage proposals apparently was limited, before July 16 these limitations had not been communicated to the Company (A. R. 47, 65-66, 72, 75, 89).

On July 16, 1963, the day on which the employees were to vote on ratification of the contract, the Company and the Local received a telegram from the International's president advising for the first time that under the Inter-

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[7] Both here and in the prefatory portion of the Questions Presented, *supra*, p. 2, petitioner has assumed that the Board would not dispute the fact that the parties to the July 13 negotiations reached tentative agreement on that date, subject only to employee ratification. It cannot be determined from the Board's Decision whether it questioned these facts—or the law—that such an agreement could not lawfully be repudiated by the International. Unless this assumption is made, the Board may have totally frustrated judicial review by relying on an unarticulated, erroneous legal rule condoning such repudiations. The Court of Appeals should have remanded for a proper finding of these facts but it refused to do so.

national constitution ". . . no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board" (A. R. 221, 124). Later that day, the ratification vote was taken, and the employees ratified the agreement by an overwhelming majority (A. R. 90-1, 94, 109). On July 18, 1963, the contract was signed by the Local officers and the Company (A. R. 221).

On August 1, 1963, after a vote of its executive board, the International rejected the contract "by reason of the substandard provisions thereof" and demanded further negotiations, thus attempting to exercise the right of disapproval it first asserted in its telegram of July 16 (A. R. 222, 225, 124-5).

Thereafter, the Company refused to negotiate further with the International (A. R. 222-3).

The complaint issued by the General Counsel did not charge petitioner with bad faith or a violation of Section 8 (a) (5) of the Act in negotiating with the Local on July 12 and 13; it merely charged that when the Company "entered into" the contract with the Local on July 18 and thereafter refused to bargain it violated the Act (Complaint, pars. VIII, XIII; A. R. 6-8).

Furthermore, the Trial Examiner conceded that "the record in the case is somewhat uncertain" with respect to the Local's apparent authority and expressly refused to decide whether the Local had either actual or apparent authority because "whatever authority, real or apparent, Local 42 and its officers had was revoked to [petitioner's] knowledge before **execution** of the 1963 labor contract" (A. R. 224-5) (emphasis added). In so finding the Trial Examiner clearly ruled that the International's July 16 telegram was an effective disavowal of the Local's authority and that the International was thus free to reassert its statutory right to require the Company to bargain (A. R.

225). The Trial Examiner concluded "that by **executing** an agreement with the officers of Local 42 and by refusing to meet with the [International] as found, [petitioner] refused to bargain with the [International] in violation of Section 8 (a) (1) and (5) of the Act as alleged" (A. R. 226) (emphasis added). Before the Board, petitioner specifically excepted to these findings of Trial Examiner, petitioner arguing that any alleged revocation of the Local's authority was untimely because the contract had already been negotiated when the telegram was received. The exception stated:

> "3. The Trial Examiner erred in his Decision by confusing 'negotiated' contract with 'executed' contract (Dec. p. 5, lines 39, 40 and 41, p. 6, lines 7 and 8) [A. R. 225, ll. 7-11, A. R. 225, ll. 29-32]. The evidence is uncontradicted that the alleged 'revocation of authority' was not received until after the contract was negotiated (Tr. 105, 31, 110) [A. R. 90-91, 40, 93-94]. The [International] had no right to refuse to **execute** the contract (Section 85 of the Constitution, Tr. 22-23) [A. R. 34-35]. The Examiner's position ignores the Law of Agency and the provisions of Section 2 (13) of the Act" (A. R. 231).

The Board, nevertheless, adopted the Trial Examiner's findings, conclusions and recommendations as set forth above without even discussing this issue (A. R. 233-4).

The Court of Appeals enforced the Board's order holding that "The evidence does not fairly justify a conclusion . . . that, in the eyes of petitioner, Local 42 had either actual or apparent authority to negotiate any binding agreements" (Opinion, Appendix A, *infra*, p. 31). In support of this conclusion the Court, after discussing certain "facts" neither found[8] nor relied on by the Trial Examiner and the Board, reasoned:

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[8] While the Court held that "Petitioner was well aware of the disagreement **over wage demands** between [the International Vice-President] and Local 42 as being the reason why [the In-

> "Petitioner also ignored [International President] Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless or until the terms of such agreement were first approved by International. In spite of this warning, petitioner, two days later on July 18th, entered into the agreement now in question" (Opinion, Appendix A, *infra*, p. 31).

This reasoning completely ignores the argument repeatedly pressed by petitioner in its Brief and its Reply Brief that the telegram was too late to constitute an effective disavowal of the Local's authority since the Local and the Company had already reached agreement subject only to ratification by the employees (See Appendix C, *infra*, pp. 53-60).

In its Petition for Rehearing, petitioner pointed out this error to the Court below (R. 57-60, Petition for Rehearing, pp. 6-9).

By a similar error in reasoning, the Court below found that Section 85 of the International Constitution gave each local the right to negotiate its own contracts **subject to approval of the general executive board** and that therefore "the approval of the general executive board of International is an essential prerequisite to a final contract." (Opinion, Appendix A, *infra*, p. 34). The Court, however, found that the Company was barred by this limitation without finding that it had ever been communicated to the Company prior to the consummation of the negotiations in a tentative agreement, and the record shows that

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ternational Vice-President] did not attend the July 12 meeting, . . ." (Opinion, Appendix A, *infra*, p. 31, emphasis added), there is no support in the record for this assertion. The Company was never told that there was a disagreement "over wage demands" and the Trial Examiner did not find that it was (A. R. 89, 97, 221, 225). The entire exchange on this subject was quite brief. The nature, extent and importance of the disagreement was not explained to the Company during the negotiations, and could not have been without destroying the union's bargaining position.

the Company first learned of this restriction on July 16 (A. R. 225, 47, 90). The Court thus ignored the Company's argument that negotiations by the Local pursuant to this provision in the International Constitution authorizing the Local to negotiate a contract subject to the approval of the International's general executive board creates apparent authority to negotiate a binding agreement unless the limitation requiring International approval is communicated to the Company at least prior to the conclusion of negotiations resulting in an agreement to be presented to the employees for ratification (See Appendix C, *infra,* p. 60).

The sole change made by the Board, on reviewing the Trial Examiner's Decision, was to add the following provision to the recommended order and to modify the notice to be posted by the Employer to conform to this change:

> "1. Cease and desist from:
>
> (b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder" (A. R. 233-6).

The Court of Appeals was troubled by this provision. It apparently interpreted it to mean that the International could not seek to bargain over retroactive wage increases or benefits (Opinion, Appendix A, *infra,* pp. 36-37). On December 15, 1965, after considering Petitioner's objections to the Board's proposed decree, the Court enforced the Board's order, "as interpreted in its opinion dated November 10, 1965" (Decree, Appendix B, *infra,* pp. 51-52). On February 8, 1966, the Court of Appeals denied peti-

tioner's Petition for Rehearing which pointed out that the order as enforced was inconsistent with this Court's decision in **J. I. Case v. NLRB**, 321 U. S. 332 (1944), and with the decision of the Ninth Circuit filed December 2, 1965 in **NLRB v. Golden State Bottling Company**, now reported in 353 F. 2d 667 (R. 61, 51-60).

REASONS FOR GRANTING THE WRIT.

I.

The facts presented in the record in this case are almost unique but the issue involved—whether a union may limit the authority of its negotiators after they have already reached agreement with the Company on a contract to be submitted to the employees for ratification—lies at the heart of all collective bargaining. It arises, potentially, every time collective bargaining negotiations are concluded. Its proper resolution by this Court is essential if the National Labor Relations Act is to achieve the goals for which it was enacted: the establishment and fostering of stable collective bargaining relationships. Without its resolution, no employer can safely make concessions in negotiations without the risk that, as in this case, some higher union authority than its immediate negotiators will demand further concessions as the price of a contract. Yet the Trial Examiner, the Board and the Court below, without so much as discussing this fundamental issue and despite petitioner's repeated insistence that the issue must be resolved, all held that a certified international could repudiate the work of its authorized negotiators after they had reached agreement with the Company, provided only that the International asserted the right to reject that agreement prior to final execution. Such a holding is in conflict with the clear Congressional mandate of Section 2 (13) of the Act, 29 U. S. C. § 152 (13) that ordinary, common-law principles of agency are to govern union responsibility in matters relating to collective bargaining.

This fundamental question of federal labor law has not previously been resolved by this Court and it should be resolved now.

1. The issue in this case happens to arise in the context of a conflict between a certified international union and its local. But the Board refused to decide the question of whether the local was actually or apparently authorized to negotiate for the International, and the Court below, in deciding that the local was not so authorized, relied on the July 16th telegram which attempted to subject the results of a completed negotiation to International executive board approval. The issue here would therefore be identical even if the Company had bargained directly with the International Vice-President or any other apparently authorized representative of the International. This question obviously is of broad significance to the development of federal labor law since a rule allowing such last-minute restrictions on a negotiator's authority would create suspicion and distrust rather than stable collective bargaining relationships and would totally change the entire psychology at the bargaining table. **Cf., M & M Oldsmobile, Inc., (Local 259, U. A. W.)**, 156 NLRB No. 91, 61 LRRM 1121, 1123, 1966 CCH NLRB ¶ 20,150 (1966).

2. Section 2 (13) of the National Labor Relations Act, 29 U. S. C., § 152 (13), added by the Taft-Hartley amendment in 1947, represents "a clear statutory mandate to apply the 'ordinary law of agency'" in determining union responsibility. **International Longshoremen's Union (Sunshine Line and Twine Company)**, 79 NLRB 1487, 1507 (1948). "[B]oth employers and labor organizations will be responsible for the acts of their agents in accordance with ordinary common law rules of agency (and only ordinary evidence will be required to establish the agents' authority)." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947), 1 Leg. Hist. of the L. M. R. A., 1947, 540 (U. S. Government Printing Office 1948). While numerous courts of appeals have indicated their acceptance of this

change, e. g., **I. L. G. W. U. v. NLRB**, 237 F. 2d 545, 551 (D. C. Cir. 1956); **NLRB v. International Longshoremen's Union**, 283 F. 2d 558, 563 (9th Cir. 1960); **United Mine Workers v. Patton**, 211 F. 2d 742, 747-8 (4th Cir.), **cert. denied**, 348 U. S. 1824 (1954), the Eighth Circuit apparently does not. **NLRB v. Arkansas-Louisiana Gas Company**, 333 F. 2d 790, 795-6 (1964) (Employer responsibility). Perhaps this conflict in approach between the circuits helps to explain the Eighth Circuit's result here, although its opinion does not refer to this problem,[9] because under ordinary principles of agency no such thirteenth-hour limitation as was approved in this case would be effective.

3. The results here reached by the Eighth Circuit also clearly conflict in principle with the results reached by other courts of appeals dealing with similar problems. Thus, the Seventh Circuit in **NLRB v. Acme Mattress Co., Inc.**, 192 F. 2d 524, 527 (1951), held the International responsible for the actions of a person held out by it as its negotiator where "[n]o limitation was communicated to the Company with respect to Cline's [the negotiator's] apparent authority to impart to the Company the terms and conditions upon which the International would execute the contract. . . ." And in **NLRB v. Winchester Electronics, Incorporated**, 295 F. 2d 288, 290-1 (1961), the Second Circuit refused to allow an employer's president to repudiate an agreement after negotiations had closed but prior to the contract's execution because the employer's negotiator had actual or apparent authority to bargain and had not told the union negotiator during the bargaining that further approval from the employer was necessary.

4. Perhaps the most distressing feature of the Court's result here is that although the petitioner raised the ques-

[9] It should be noted, however, that the Court did cite **NLRB v. Arkansas-Louisiana Gas Co.**, in its opinion, *infra*, p. 29, and that both opinions were by Circuit Judge Vogel.

tion of whether the July 16th telegram was untimely both before the Board and in the Court below, neither the Board nor that Court ever discussed this issue. Such action by the Court of Appeals in approving the Board's decision under these circumstances is directly contrary to this Court's recent directive that the Board may not be allowed to frustrate judicial review by hiding behind unarticulated bases of decision. **NLRB v. Metropolitan Life Ins. Co.**, 380 U. S. 438, 442-44 (1965). As in **American Ship Building Co. v. NLRB**, 380 U. S. 300 (1965), "The compelling conclusion is that the Board has failed to 'disclose the basis of its order' and to 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *Id.*, 380 U. S. at 321 (concurring opinion of Mr. Justice White).

II.

Paragraph 1 (b) of the Board's order which the Court below interpreted and then enforced does not contain any of the safeguards and limitations carefully delineated by this Court in the controlling decision of **J. I. Case Co. v. NLRB**, 321 U. S. 332 (1944) (Order Appendix B, *infra*, pp. 40-45; Opinion, Appendix A, *infra*, pp. 36-37). This paragraph of the order is not limited to redressing the unfair labor practice found to have been committed—the refusal to bargain—but rather invalidates the contract for all purposes. Moreover, it purports to preserve employee rights under that contract but does not preserve employer defenses as required by **J. I. Case Co. v. NLRB**, *supra*, 321 U. S. at 341-2. As such the decree of the Court below not only is not in accord with the applicable decision of this Court, but also conflicts with the recent holding of the Ninth Circuit in **NLRB v. Golden State Bottling Company**, 353 F. 2d 667 (December 2, 1965) (Appendix D, *infra*, pp. 61-67 at p. 67). This remedy is frequently used by the Board not only in refusal to bargain cases, but also in cases involving interference and domination of a labor or-

ganization in violation of Section 8 (a) (2) of the Act, 29 U.S.C., § 158 (a) (2). Moreover, even as construed by the Court of Appeals, the order is vague and ambiguous, and petitioner should not be required to guess at its meaning on pain of contempt if it guesses wrong.

1. The order in **J. I. Case Co. v. NLRB**, 321 U. S. 332 (1944) was specifically modified so as to require only that the individual contracts of employment there involved not be given effect so as "*to forestall collective bargaining or deter self-organization,*" *Id.* at 341. The italicized language was added by this Court. Here the order is not limited to requiring the Company to cease giving effect to the July 18, 1963 contract for the purpose of forestalling collective bargaining. Paragraph 1 (b), literally construed, precludes the Company from giving effect to that contract for any purpose—as a defense to a prosecution under § 302 (c) (4) of the Act, 29 U. S. C., § 186 (c) (4), in a suit under § 301 of the Act, 29 U. S. C., § 185, or in any other circumstances. Not only does the order, therefore, not conform to the limitations of the Board's jurisdiction established in **J. I. Case Co. v. NLRB**, *supra*, but it also conflicts with the principle of concurrent jurisdiction in the Board and in the courts acting under § 301 as recognized in **Smith v. Evening News Association**, 371 U. S. 195, 197-8 (1962), **cf., Cresent Bed Co., Inc.** (United Steelworkers), 157 NLRB No. 22, 61 LRRM 1334, 1336, 1966 CCH NLRB ¶ 20,225 (1966). In failing to so limit its order to redressing the failure to bargain found to have been committed, the Board completely overstepped its jurisdiction and its order, at the very least, should have been modified. **J. I. Case Co. v. NLRB**, *supra*, 321 U. S. at 340.

2. Moreover, it may be doubted that paragraph 1 (b) of the Board's order serves any useful purpose. The Board in paragraph 1 (a) ordered the Company to cease and desist from refusing to bargain exclusively with the International and in paragraph 2 (a) affirmatively ordered

such bargaining upon request by the International (A. R. 227-8, 234; Appendix B, *infra*, pp. 40-41, 38). It is basic hornbook law that the duty to bargain collectively requires the Company to refrain from unilaterally changing any existing working conditions without first bargaining in good faith to an impasse. E. g., **NLRB v. Katz**, 369 U. S. 736 (1962). Thus, paragraphs 1 (a) and 2 (a) effectively prohibit the Company from making unilateral changes in the conditions established under the contract found to be invalid without first bargaining with the International. Paragraph 1 (b) is not necessary to achieve that result.

3. This Court in **J. I. Case v. NLRB**, *supra*, 321 U. S. at 341-2, specifically modified the order there involved so as to preserve any employer defenses to employee rights asserted under the invalid contracts. The order here is not so limited. On the one hand it invalidates the 1963 contract while at the same time preserving only employee rights thereunder. As such, the order here not only does not conform to the requirement of **J. I. Case v. NLRB**, *supra*, but becomes totally one-sided and unenforceable. This was the view of the Ninth Circuit, in direct conflict with the Court below, when it held, in **NLRB v. Golden State Bottling Company**, 353 F. 2d 667, 670-1 (December 2, 1965), that:

> "We fail to see how the company can cease and desist from performing or enforcing the contract while at the same time allowing the assertion of employee rights thereunder. We refuse to direct such one-sided enforcement."

The Board in **Golden State** petitioned for rehearing, citing among other cases, the decision in this case by the Court below (Appendix D, *infra*, pp. 67-68). That petition for rehearing was denied by the Ninth Circuit on January 7, 1966. The case is still pending there on a petition for reconsideration of the petition for rehearing. The petition

for reconsideration, however, is based on a point relating to the merits, not the remedy, in that case. Petitioner in this case also filed a petition for rehearing of the remedy point in the Court of Appeals (R. 51). That petition was based largely on the conflicting decision in **NLRB v. Golden State Bottling**, *supra*, and upon the Court's failure to follow the principles established in **J. I. Case v. NLRB**, *supra*. On February 8, 1966, after consideration, that petition was denied without comment (R. 61). Thus, the conflict between the Eighth and Ninth Circuit decisions will stand uncorrected and unresolved unless this Court acts.

4. The remedy provided in paragraph 1 (b) is used with some frequency by the Board—generally without the safeguards and limitations prescribed in **J. I. Case v. NLRB**, *supra* (See e. g., cases cited by the Board in its Ninth Circuit Petition for Rehearing, Appendix B, *infra*, p. 68). It is not only used in refusal to bargain cases, such as this one, but also in interference and domination cases under § 8 (a) (2), 29 U. S. C., § 158 (a) (2), of the Act where the courts also are frequently troubled by it. See, **NLRB v. Mark J. Gerry, Inc.**, 355 F. 2d 727, 729-31, 61 LRRM 2200, 2201-2 (9th Cir. 1966) (refusing enforcement).

5. Finally, even as construed in the Court below paragraph 1 (b) is extremely difficult to understand and obey. The Court of Appeals held that 1 (b) was "prospective only, with no retrospective aspects" (Opinion, Appendix A, *infra*, p. 37). But if the International seeks to negotiate, what is the dividing line between the two? Is it August 25, 1964 when the Board issued its order? Is it November 10, 1965, when the Court filed its opinion? Is it December 15, 1965, when the Court entered its decree? Or is it perhaps some later date? And is the Company really barred, as the order literally provides, from raising any defenses to employees' assertions of rights under a contract found

by the Board not to be binding on the union? Clearly, as this Court stated in **J. I. Case v. NLRB**, *supra*, 321 U. S. at 341, these "[q]uestions of construction had better be worked out before enforcement orders issued than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAM ELSON,

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Attorneys for Petitioner.

April 5, 1966.

APPENDIX A.

Opinion of the Court of Appeals (R. 19-37).

United States Court of Appeals
For the Eighth Circuit.

No. 17,810.

Independent Stave Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent.	On Petition for Review and Cross-Petition for Enforcement of An Order of the National Labor Relations Board.

[November 10, 1965.]

Before Johnsen, Vogel and Matthes, Circuit Judges.

Vogel, Circuit Judge.

Independent Stave Company, Inc., petitioner herein, asks this court to review and set aside an order of the National Labor Relations Board (hereafter Board), respondent, issued on August 25, 1964, following proceedings under § 10 of the National Labor Relations Act (hereafter Act), 29 U. S. C. A., §§ 151, et seq. The Board, in its answer to the petition, has requested enforcement of its order. The Board's decision and order are reported at 148 NLRB No. 49. No jurisdictional questions are involved.

The Board, adopting the Examiner's findings, conclusions and recommendations, held that the petitioner vio-

lated § 8 (a) (1) and (5)[1] of the Act by executing a collective bargaining agreement with Local 42 of the Coopers International Union of North America (hereafter Local 42) after refusing to bargain with Coopers International Union of North America (hereafter International). Local 42 was affiliated with International.

There was dispute in the evidence offered by the parties and heard by the Examiner. Different versions of what happened on various occasions were presented by the witnesses and inferences that could be drawn therefrom are conflicting. After evaluating the evidence, the Trial Examiner made findings as discussed below.

International was certified by the Board on September 15, 1955, as the representative of petitioner's employees involved herein. There was no subsequent certification of any other labor organization and ever since the certification International has been the duly certified collective bargaining representative of all employees in the unit. Since the certification in 1955 International has negotiated

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[1] 29 U. S. C. A., § 158, insofar as it may be pertinent herein, provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [dealing with the employees' right to self-organization and collective bargaining] of this title;

* * * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

Under § 159 (a)

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

with petitioner about wages, hours and working conditions of employees in the unit. Local 42 has participated in these negotiations.

On June 26, 1963, petitioner met with Local 42 officers and with George Calvert, Fourth Vice President of International, to negotiate a new contract. During that meeting Calvert was the principal spokesman for the employees. Proposals which Calvert and the officers of Local 42 had previously prepared and agreed upon were discussed with petitioner. No agreement was reached at this meeting.

A second bargaining session, at which Calvert and Gene Souders, attorney for International, were principal spokesmen for the employees, was held on July 11, 1963. James Boswell, petitioner's president, had been present at the meeting of June 26th but did not attend the July 11th meeting. Petitioner was represented at the latter meeting by Robert Donnelly, its attorney. Again discussion was had but no agreement was reached. At the conclusion of the second meeting it was agreed that the parties would meet again the next day but with the understanding that only non-monetary items would be discussed. The reason for this was that Donnelly claimed it would be necessary for him to take some time to consult with Boswell on monetary items and to compute the actual costs of the money items involved in the proposals.

On the morning of the scheduled meeting of July 12th, Local 42 officers met with Calvert and told him that they wanted to negotiate something less in the way of wage increases than had been proposed to petitioner in the earlier meetings. Such proposals had been previously submitted by Local 42 to International and rejected by the latter. After consulting with International's president by telephone, Calvert informed the Local 42 committee that he would not assist them in negotiating Local 42 proposals

and that he would not attend the meeting that morning. He asked that the petitioner be so advised.

The July 12th meeting was thus attended only by representatives of petitioner and by officers of Local 42. Dean Rhoten, president of Local 42, was the principal spokesman for the group. Rhoten told the petitioner's representatives that Calvert would not attend the meeting and that the local group was representing Local 42. Boswell asked where Calvert was and Rhoten advised him that there had been a disagreement between the local and International and that Calvert would not attend. He also added that the petitioner was not dealing with International but with Local 42 and Boswell responded that such an arrangement was "fine with him."

During the July 12th meeting petitioner made what it described as a "final offer" to the officers of Local 42. This offer covered monetary as well as non-monetary items. Negotiations continued all that day and resumed again on Saturday morning, July 13th. On Monday, July 15th, petitioner by letter gave Local 42 until July 18th to accept or reject its "final offer", which it stated would become "void" if not accepted before then. Attached to the letter was a copy of the offer. Petitioner did not send copies of the letter or the offer to International.

On July 16, 1963, James J. Doyle, President of International, sent the following telegram to James Boswell, petitioner's President, Robert Donnelly, petitioner's attorney, and Dean Rhoten, president of Local 42:

> "This is to advise under Sections 34 and 85 of Coopers International Constitution no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board."

After Rhoten had received his copy of International's telegram he discussed it with Donnelly. Rhoten testified that

Donnelly "suggested that we go ahead and sign the contract because George Calvert had walked out, thought it would be legal for us to sign a contract, I'll put it that way, because Calvert walked out of the negotiations."

On July 18, 1963, Rhoten and other officers of Local 42 signed a labor contract with petitioner. The contract had been ratified by members of Local 42 on July 16, 1963, by a vote of 74 to 25. A space for Vice President Calvert's signature was included in the document but he at no time has executed his signature thereon.

After the contract had been executed petitioner asked the officers of Local 42 to present it to International. Rhoten presented the agreement to Calvert and to Ernest Higdon, First Vice President of International, on July 21st or July 22nd. This was the first time International officials were aware that a contract had been executed between Local 42 and petitioner. Calvert refused to sign the agreement in the space provided for his signature, saying that it was unacceptable to him but that he would forward it to International.

After receiving the agreement the executive board of International voted to reject it and Doyle, International's President, notified petitioner to that effect. His letter to petitioner is as follows:

"August 1, 1963

"Mr. J. E. Boswell, President
Independence [sic] Stave Company
Lebanon, Missouri

Dear Sir:

"Coopers International Union, AFL-CIO has noted the draft of collective bargaining agreement dated July 18, 1963, proposed for employees of your company. You are advised that Coopers International Union, AFL-CIO rejects the said draft agreement by

reason of sub-standard provisions thereof. The General Executive Board of Coopers International Union has refused to approve the draft agreement and the said draft agreement is null and void and of no binding effect upon Local 42 and Coopers International Union.

"Coopers International Union, AFL-CIO demands that your Company meet with its representatives for the purpose of resumption of negotiating for a collective bargaining agreement covering your employees."

Boswell directed Donnelly to reply to International's request for bargaining. Donnelly did so through the following letter, dated August 6, 1963:

"Mr. James J. Doyle, President
Coopers International Union
120 Boylston Street
Boston 16, Massachusetts

Dear Mr. Doyle:

"We have your letter of August 1, 1963, addressed to Mr. J. E. Boswell, President, Independent Stave Company, Lebanon, Missouri.

"On July 11, 1963, as representative of the Company, I met with Mr. George Calvert of your office, Mr. Gene Souders, his attorney, and with eight representatives of the local union, here at my office. After much discussion concerning a proposed new contract, and at Mr. Calvert's request, it was agreed that we would meet again at 10:00 A. M. the following morning, July 12, 1963, for further negotiations. At 9:15 A. M. on July 12, 1963, I called Mr. Calvert at the Munger Moss Motel here in Lebanon and requested that we meet at the Company offices rather than at my office. This was agreeable with Mr. Calvert. At 10:15 A. M. on July 12, 1963, Mr. Dean Rhoten, President

of the Local, appeared with four other men, and sat down with representatives of the Company, including the writer of this letter, at the conference table. The Company was then advised that Mr. Calvert refused to be present and a demand was made upon the Company that it negotiate with those present. Negotiation then proceeded on July 12, 1963, and on subsequent occasions, a tentative agreement was reached, and submitted to and approved by the men in the bargaining unit, and was signed on the 18th day of July, 1963.

"The Company considers the actions of Mr. Calvert outlined above a refusal to bargain, and, therefore, an unfair labor practice. Under the circumstances, we regard your demand that bargaining sessions be resumed as completely unreasonable."

The Examiner found that Calvert, in company with International's attorney, Souders, went to the petitioner's office on August 7, 1963, in an attempt to arrange a meeting with Boswell. They were told by petitioner's receptionist that Boswell could not see them that morning. They inquired if Boswell could see them that afternoon and were told that Boswell was busy that afternoon. They then asked if they could come back the following morning but were told that, "* * * Mr. Boswell will not see you at all." There is dispute with reference to the latter occurrence, but the petitioner's receptionist was not called as a witness and the Examiner's findings in connection with the incident are well substantiated in the record.[2]

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[2] As stated by the Trial Examiner:

"* * * Mr. Boswell also testified that the first knowledge he had of Calvert's and Souder's visit to his plant was when charges were filed against the [petitioner] and that he did not tell his receptionist he would not meet with the men. The receptionist was not called and no explanation was made of [petitioner's] failure to do so. As stated, I credit Calvert's account."

Clearly the failure by the petitioner to call its own employee lends credence to the position of International.

On or about August 5, 1963, International advised Dean Rhoten by telegram that Local 42 was placed under trusteeship effective immediately and that Vice President Calvert had been appointed trustee to administer the affairs of Local 42. On September 5, 1963, International filed a suit, through George Calvert as trustee of Local 42, in the Circuit Court of Laclede County, Missouri, against Rhoten, asking that the state court issue its decree enjoining and restraining the defendant from withholding from the plaintiff property of Local 42 of any kind or nature in his possession, custody or control to which plaintiff was entitled by virtue of his office as trustee of Local 42; from retaining or exercising possession, title, custody or control over any property of any kind or nature which is the property of said Local 42; and from interfering with, impeding, precluding or preventing plaintiff from exercising, fulfilling or executing the functions and duties of his office as trustee of said Local 42. Plaintiff asked the court to issue an order requiring the defendant to appear and show cause why a temporary injunction should not be granted. An order to show cause was so issued. A hearing commenced on September 24, 1963. At the conclusion of the hearing the court found the issues for defendant Rhoten and denied the injunction. On September 28, 1963, the petition in the state court suit was dismissed by the plaintiff without prejudice.

On the basis of the evidence referred to, the Trial Examiner concluded, in pertinent part:

> "4. At all times since September 15, 1955, [International] has been, and now is, the exclusive representative of the employees in the unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
>
> "5. By refusing on July 18, August 6 and August 7, 1963, and all times thereafter, to bargain collectively

with [International] as the exclusive representative of its employees in the appropriate unit, [petitioner] has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

"6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act."

The Board issued the following order:

"Upon the basis of the foregoing findings of fact and conclusions of law, * * * Independent Stave Company, Inc., Lebanon, Missouri, its officers, agents, successors and assigns, shall:

"1. Cease and desist from:

"(a) Refusing to bargain collectively with [International] as the exclusive bargaining representative of its employees constituting the unit herein found to be appropriate for the purposes of collective bargaining.

"(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder.

"(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor or-

ganization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

"2. Take the following affirmative action which it is found will effectuate the policies of the Act:

"(a) Upon request bargain collectively with [International] as the exclusive representative of employees in the aforesaid appropriate unit, and if an understanding is reached embody such understanding in a signed agreement."

The order further required petitioner to post appropriate notices at its plant in Lebanon, Missouri.

The first of two contentions of error raised by petitioner is that:

"I. The Board's Finding That the Employer Failed to Bargain in Good Faith Is Not Supported by Substantial Evidence on the Record as a Whole:

"A. The Record as a Whole Clearly Demonstrates That the International Abandoned Its Status as Exclusive Bargaining Representative and That Local 42 Properly Bargained for the Employees.

"B. The Record as a Whole Clearly Demonstrates That Local 42 Had Both Actual and Apparent Authority to Negotiate an Agreement With the Employer."

After a thorough review of the entire record, we hold that the facts as found by the Examiner are fairly substantiated by the testimony. The Examiner's conclusions drawn therefrom are reasonable and proper. Clearly, this court, even if it were otherwise disposed, may not set aside the findings of the Board and deny enforcement of its orders on a difference of opinion basis. We must be

mindful of the Congressional admonition in 29 U. S. C. A., § 160 (e), that

> "* * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *"

and of the manner in which that section has been interpreted. See: **N. L. R. B. v. Walton Mfg. Co.**, 1962, 369 U. S. 404, 405, 82 S. Ct. 853, 7 L. Ed. 2d 829; **Universal Camera Corp. v. N. L. R. B.**, 1951, 340 U. S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456; **N. L. R. B. v. Arkansas-Louisana Gas Co.**, 8 Cir., 1964, 333 F. 2d 790, 794-795; **N. L. R. B. v. Douglas & Lomason Co.**, 8 Cir., 1964, 333 F. 2d 510, 513.

As we have pointed out, International became the certified bargaining representative of this unit of petitioner's employees on September 15, 1955. The record indicates that negotiations for collective bargaining agreements were entered into by the petitioner with representatives of Local 42 and also with the representatives of International. In all prior instances, with the exception of the contract agreement of 1957, the agreements were signed or approved by International. The reasons for International failing to sign the 1957 agreement are not clearly disclosed in the record. However, International acquiesced in the 1957 agreement and accepted its portion of the dues collected pursuant to the contract provisions. It cannot be doubted that since 1955 International has been the Board certified bargaining agent for petitioner's employees as contemplated under 29 U. S. C. A., § 159, set out in f. n. 1, supra. The Supreme Court has left no doubt about the duty to bargain only with the certified representative. This duty is set out in **Medo Photo Supply Corp. v. N. L. R. B.**, 1944, 321 U. S. 678, 683-684, 64 S. Ct. 830, 88 L. Ed. 1007, 1011:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the

chosen representatives of his employees. The obligation being exclusive, see § 9 (a) of the Act. 29 U. S. C., § 159 (a), **it exacts 'the negative duty to treat with no other.' Labor Board v. Jones & Laughlin Corp.,** 301 U. S. 1, 44; and see **Virginia Ry. Co. v. System Federation,** 300 U. S. 515, 548-549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

"That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in **J. I. Case Co. v. Labor Board,** 321 U. S. 332; cf. **Order of Railroad Telegraphers v. Railway Express Agency,** 321 U. S. 342; see also **National Licorice Co. v. Labor Board,** 309 U. S. 50, 359-361. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. **Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained,** as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8 (1) of the Act." (Emphasis supplied.)

Petitioner's employees have never revoked the designation of International as their bargaining agent. There has been no decertification.

The evidence fully justifies the conclusion that it was petitioner and not International who refused to bargain. The evidence does not fairly justify a conclusion that International "abandoned" its status as exclusive bargaining representative for petitioner's employees nor that, in the eyes of petitioner, Local 42 had either actual or apparent authority to negotiate any binding agreement. The petitioner, recognizing International's status as the sole bargaining agent, called Calvert on the morning of July 12, 1963, to notify him of a change in the meeting place for the scheduled negotiating session, which session, as pointed out earlier, Calvert did not attend. Officers of Local 42, on the other hand, were not personally notified of the change by petitioner. Petitioner was well aware of the disagreement over wage demands between Calvert and Local 42 as being the reason why Calvert did not attend the July 12th meeting, which, incidentally, was originally scheduled to deal only with non-monetary matters. Petitioner also ignored Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless or until the terms of such agreement were first approved by International. In spite of the warning, petitioner, two days later on July 18th, entered into the agreement now in question. Petitioner asked that the officers of Local 42 forward a copy thereof to International. The fact that the agreement contained a place for Calvert's signature is an indication that petitioner realized International had not abandoned its status as bargaining agent for petitioner's employees. Petitioner's attitude in this matter is further evidenced by its refusal to speak with the officers and representatives of International who visited petitioner's plant on August 7, 1963. The Examiner was thoroughly

justified in concluding that petitioner was refusing to bargain with the proper certified bargaining representative and therefore was in violation of the Act.

The situation here is much like that found in **Quaker State Oil Refining Corp. v. N. L. R. B.**, 3 Cir., 1959, 270 F. 2d 40, certiorari denied, 361 U. S. 917, 80 S. Ct. 261, 4 L. Ed. 2d 185. There the employer attempted to obtain a working arrangement directly with the local union, thus by-passing the Oil Workers International Union, which was the certified bargaining agent. The company had sent to its employees a letter which proposed a higher wage increase than that previously negotiated with the national union and which urged the employees to sign the agreement without the national union's approval. The court held that it was the clear duty of the employer to bargain with the certified representatives of the employees exclusively and that its failure to do so was a violation of § 8 (a) (1) and (5) of the Act. After passing on other matters involved in that case, the court said at page 46 of 270 F. 2d:

> "The company characterizes its conduct as trying to help the employees who signed the petitions to get the [proposed] contract signed. It excuses its letter by saying that it endeavored to have the employees first try to have the International Union sign the agreement and if they could not accomplish this, to have the local union officials sign it.
>
> 'There is sufficient in the proofs to substantiate the charge. **It is clearly the duty of the employer under Section 8 (a) (5), (1) of the Act to bargain collectively with the chosen representative of the employees exclusively. Medo Photo Supply Corp. v. N. L. R. B.**, 1944, 321 U. S. 678, 683-684, 64 S. Ct. 830, 88 L. Ed. 1007. The Board considered the company's representations that its only purpose was to dispose of the wage dispute and thus avoid any reason to

strike. It refused to accept them because, since the employees had not repudiated their representative, differences with the latter must be handled intra-union not through the employer. **While the relationship of the local union with its bargaining representative was not satisfactory, the company had no right to interfere with it as it did. In so doing it violated the Act.''** (Emphasis supplied.)

In the same manner the petitioner in the instant case interfered in the dispute between Local 42 and International, the certified bargaining agent, and it violated the Act in so doing.

Petitioner would attempt to draw support from the provisions of Section 85 of International's constitution which provides in part:

> ''Each local union shall have autonomy over its own affairs and shall make their own contracts governing the hours of labor, working conditions, and scale of wages to be paid in their class of work and in the use of the union label, **subject to the approval of the general executive board,** but under no circumstances shall the general executive board approve of a contract nor a local union sign a contract which is not approved by the general executive board that calls for a lower scale of wages or poorer working conditions than are received by other locals or locals in the vicinity or part of the country doing the same work.
>
> * * * * * * * *
>
> ''Local unions shall retain their right to negotiate their own contracts as heretofore, unless they deem otherwise, and if they so desire they may request the assistance of any member of the general executive board during contract negotiations, **provided, however, that the local unions' contract proposals have**

been approved by the general executive board.'' (Emphasis supplied.)

The petitioner interprets the foregoing as giving ''* * * the Local actual authority to negotiate an agreement with the Company''. This is a misinterpretation. The emphasized portions of the paragraphs relied on indicate clearly that the approval of the general executive board of International is an essential prerequisite to a final contract. Here petitioner knew that there was a dispute between Local 42 and International and, as pointed out in the **Quaker State Oil Refining Corp. case,** supra, an employer may not ignore these differences to the complete disregard of the certified bargaining agent. As indicated by the record and as known to petitioner, there was a long history of differing opinions between International and Local 42. In spite of this, petitioner's employees had not effected any decertification of International as their bargaining agent. If petitioner had in good faith believed that International failed to negotiate, its proper course of action would have been to file charges before the Board, rather than to have signed an illegal contract with Local 42 alone. See **N. L. R. B. v. Plumbers Union, etc.,** 2 Cir., 1962, 299 F.2d 497, 501, and cases cited therein.

Petitioner's second contention of error is that:

> ''II. The Board Erred in Failing to Admit Into Evidence and to Consider (1) the State Court Decision That the Local Had Authority to Negotiate, (2) the State Court Transcript, and (3) the Admission of the International That the Local Was the Collective Bargaining Representative of the Company's Employees.''

The state court action referred to was that mentioned earlier which was brought by George Calvert as trustee of Local 42 against Dean Rhoten in the Circuit Court of the County of Laclede, State of Missouri.

We think no error was committed in the rejection. § 10 (a) of the Act, 29 U. S. C. A. § 160, provides in part:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. **This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:** * * *." (Emphasis supplied.)

See, **N. L. R. B. v. Supreme Dyeing & Finishing Corp.**, 1 Cir., 1965, 340 F. 2d 493, 494, f. n. 1 (ignoring of prior determination by Rhode Island Department of Employment Security); **N. L. R. B. v. Pacific Intermountain Express Co.**, 8 Cir., 1955, 228 F. 2d 170, 176, certiorari denied, 351 U. S. 952, 76 S. Ct. 850, 100 L. Ed. 1476 (refusal to reopen record to show subsequent decision of state tribunal); **N. L. R. B. v. Bell Aircraft Corp.**, 2 Cir., 1953, 206 F. 2d 235, 237 (ignoring of prior arbitrator's award); **N. L. R. B. v. Monsanto Chemical Co.**, 8 Cir., 1953, 205 F. 2d 763, 764 (waiving by N. L. R. B. of its own procedural rules to obtain statutory jurisdiction of dispute); **N. L. R. B. v. International Union, etc.**, 7 Cir., 1952, 194 F. 2d 698, 702 (ignoring of prior action before a Wisconsin state agency) **N. L. R. B. v. Walt Disney Productions**, 9 Cir., 1944, 146 F. 2d 44, 48, certiorari denied, 324 U. S. 877, 65 S. Ct. 1025, 89 L. Ed. 1429 (arbitration policy of federal N. W. L. B. not binding on N. L. R. B.). Although there is no apparent authority for the proposition, it would logically follow that if the Board has exclusive jurisdiction where unfair labor practices are involved, it could ignore what transpired at another proceeding, such as the state court hearing herein involved, as well as the result of such other proceeding. It is also possible, however, that the state court transcript was actually viewed by the Board, since the Board received it in the rejected exhibit file and since it had to review the Trial Examiner's evidentiary rulings.

Even if there were some conceivable basis for the admission of the state court transcript for use in impeaching witnesses, etc.,[3] there was no prejudicial error to petitioner here. For one thing, the evidence against petitioner, as we have pointed out, was substantial even if we assume part of it would have been discredited by the admission of the state court transcript. See, **Bituminous Material & Supply Co. v. N. L. R. B.**, 8 Cir., 1960, 281 F. 2d 365, 369. Further, as pointed out by respondent, to the extent that the state court transcript showed that International had approved of what it viewed as sub-standard contracts between other locals and other employers, it is immaterial in light of the evidence herein that International had warned petitioner that it would not honor an agreement between petitioner and Local 42.

While International's letter of August 1, 1963, to petitioner took the position that the agreement of July 18, 1963, was "null and void", the Board saw fit to allow the relations with employees which had been established under the agreement and the rights which employees had acquired thereunder to stand. In ordering petitioner to cease and desist from performing or giving effect to the agreement and to engage in bargaining with International upon request, the Board added, as noted above, the following qualification or proviso:

> "* * * provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder".

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[3] Cf., **N. L. R. B. v. Dewey Portland Cement Co., etc.**, 10 Cir., 1964, 336 F. 2d 117, 119-120; **N. L. R. B. v. Burns**, 8 Cir., 1953, 207 F. 2d 434, 436-437.

The effect of this would seem to be that petitioner was required to bargain with International only as to conditions projectively, or from the date of the Board's order, and not retrospectively or in attempted reach backward at anything which had gone before.

In summary, then, we hold that International did not abdicate its power as the certified bargaining agent of the employees, nor did it give to Local 42 power to enter into a contract without its approval. We accordingly direct that an order be entered enforcing the Board's proposed order, but in doing so we make clear what is implicit in the order; i. e., that such order be prospective only, with no retrospective aspects. This means, of course, that International can at any time reopen the negotiations with petitioner notwithstanding the present existing agreement between petitioner and Local 42.

The Board's order will be enforced as interpreted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

1. *Recommended Order of the Trial Examiner (A. R. 227-230).*

Recommended Order.

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Independent Stave Company, Inc., Lebanon, Missouri, its officers agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees constituting the unit herein found to be appropriate for the purposes of collective bargaining.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of employees in the aforesaid appropriate unit, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its plant in Lebanon, Missouri, the notice attached hereto and marked Appendix.[8] Copies of said

[8] In the event that these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in

notice to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Seventeenth Region in writing within 20 days from the receipt of this Decision[9] and Recommended Order what steps it has taken to comply herewith.

Dated at Washington, D. C. May 8, 1964.

/s/ George J. Bott
George J. Bott,
Trial Examiner.

Appendix.

Notice to All Employees
Pursuant to
The Recommendations of a Trial Examiner.

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively in good faith with Coopers International Union of North America, AFL-CIO, as the exclusive representative of all employees

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the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

[9] In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

in the bargaining unit described below with respect to rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed contract. The bargaining unit is:

All plant employees handling cooperage, excluding all green mill employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

We Will Not in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

INDEPENDENT STAVE COMPANY, INC.
(Employer.)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1200 Rialto Building, 906 Grand Avenue, Kansas City, Missouri 64106 (Tel. No. Baltimore 1-7000 Ext. 731), if they have any question concerning this notice or compliance with its provisions.

2. *The Board's Order (A. R. 234-236).*

Order.

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the Board hereby adopts as its

order, the Order recommended by the Trial Examiner and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as well as the additional action set forth below in a new paragraph lettered 1 (b). The present paragraph 1 (b) in the Trial Examiner's Recommended Order shall be relettered 1 (c). The Respondent shall post the revised notice attached hereto as Appendix A.

1. Cease and desist from:

(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder.

Dated, Washington, D. C.
Aug 25, 1964.

.....
FRANK W. McCULLOUGH,
Chairman,

.....
JOHN H. FANNING,
Member,

.....
HOWARD JENKINS, JR.,
Member,

National Labor Relations Board.

(Seal)

Appendix A.

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively in good faith with Coopers International Union of North America, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed contract. The bargaining unit is:

> All plant employees handling cooperage, excluding all green mill employees, office clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

We Will Not perform or give effect to our agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require us to vary or abandon any wage, hour, seniority, or other substantive feature of our relations with our employees which we have established in the performance of this agreement, or to prejudice the assertion by employees of any rights they acquired thereunder.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

INDEPENDENT STAVE COMPANY, INC.,

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1200 Rialto Building, 906 Grand Avenue, Kansas City, Missouri 64106 (Tel. No. Baltimore 1-7000 Ext. 731), if they have any question concerning this notice or compliance with its provisions.

3. *Extract From Petition for Review, Filed September 18, 1964, in the Court of Appeals for the Eighth Circuit by Independent Stave Company, Inc., Petitioner Herein (R. 4).*

* * * * * * *

(15) The Board, at page 2 of its Decision and Order, orders that Petitioner:

"1. Cease and desist from:

"(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the

assertion by the employees of any rights acquired thereunder."

This portion of the Decision and Order is ambiguous, misleading, and confusing in its application to the problem here involved. If, for example, Petitioner unilaterally cuts wages back to the wage scale in effect before the agreement of July 18, 1963, and negotiated from the lower scale, would it be guilty of a violation of the Order and Decision and of an unfair labor practice? The Board should not be allowed to void the agreement of July 18, 1963, and, at the same time to give the Union the benefit of the concessions made by Petitioner therein.

If the Board intends that Petitioner must commence bargaining, intends that the employees shall not be deprived of rights acquired under the agreement of July 18, 1963, and intends that the Union shall not be limited in its demands to the provisions established by performance of the agreement of July 18, 1963, then the Decision and Order is grossly unfair to the Petitioner and should be corrected.

* * * * * * * *

4. *The Board's Proposed Decree (R. 38).*

(Filed Nov. 22, 1965, Robert C. Tucker, Clerk.)

United States Court of Appeals for the Eighth Circuit.

Independent Stave Company, Inc., Petitioner, v. National Labor Relations Board, Respondent.	No. 17,810.

Decree (as proposed by Respondent).

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964, directed against Petitioner, its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

Dated:

5. *Petitioner's Objections to the Board's Proposed Decree (R. 41-43).*

November 24, 1965

Honorable Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
United States Court and Custom House
St. Louis, Missouri 63101

Re: Independent Stave Company, Inc. v. NLRB

No. 17,810

Dear Mr. Tucker:

In accordance with Rule 27 (1) of the Rules of this Court, we hereby present our objections, on behalf of Independent Stave Company, Inc., petitioner, to the proposed decree served upon us by the National Labor Relations Board in the above case under cover of its letter of November 18, 1965, and received by us November 22, 1965.

The proposed decree, in our opinion, is not in conformity with this Court's opinion, particularly pages 18 and 19 thereof, or with the authorities cited to the Court by the NLRB in its letter of May 14, 1965 to the Court responding to arguments of counsel and questions raised by the Court at the oral argument on May 10, 1965.

Our objections to the Board's proposed decree stem solely from paragraph 1 (b) of the Board's order and the related provisions of the Appendix A notice to be posted by the employer. Our objections are three-fold: (1) The Board's order is not limited to enjoining reliance on the July 18, 1963 agreement with the Local **for the purposes of forestalling collective bargaining with the International union.** See **J. I. Case Co. v. NLRB**, 321 U. S. 332, 340-42 (1944). For example, the employer may want to rely on

the effectiveness of that agreement as a defense to a prosecution under Section 302 of the Taft-Hartley Act, 29 U. S. C., § 186, for payment of dues which were checked off and paid to the union throughout this period. See 29 U. S. C., § 186 (c) (4). (2) The Board's order does not clearly require the employer only to bargain about present and future conditions of employment in accordance with the Court's opinion. Opinion, pp. 18-19. (3) The Board's order, if literally construed, precludes the employer from raising any defenses to any action or suit by an employee attempting to enforce his rights under the July 18, 1963 agreement. See **J. I. Case Co. v. NLRB**, 321 U. S. 332, 341-2 (1944).

We call the Court's attention to the statement in its opinion that "The effect of this [the proviso to paragraph 1 (b) of the Board's order] would seem to be that the petitioner was required to bargain with the International only as to conditions projectively, or from the date of the Board's order, and not retrospectively or in attempted reach backward at anything which had gone before." Opinion, pp. 18-19. The Board's proposed decree does not embody any direction in this respect.

In addition, the Supreme Court has modified an NLRB order almost identical to that proposed by the Board in this case, and the Court's discussion of the general principles involved in such a modification is relevant here:

> ". . . Questions of construction had better be ironed out before enforcement orders issued than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning.

It will occur often enough when every reasonable effort is made to avoid it. . . .'' **J. I. Case Co. v. NLRB**, 321 U. S. at 341, 88 L. ed. at 769 (1944).

The **J. I. Case Co.** decision was specifically cited by the Board in its letter of May 14, 1965, to this Court regarding its proposed paragraph 1 (b) of the instant order, yet the proposed decree does not reflect the modifications which the Supreme Court there imposed on a similar decree.

Petitioner's proposed decree does reflect both the modifications required by **J. I. Case Co.** and those required by the opinion of the Court in the present case. Five copies of petitioner's proposed decree are attached hereto. Three copies of this letter and petitioner's proposed decree have been sent to the NLRB as indicated below.

Very truly yours,

HUSCH, EPPENBERGER, DONOHUE, ELSON & CORNFELD,

By /s/ STEPHEN W. SKRAINKA,
STEPHEN W. SKRAINKA.

SWS:scg

Enclosures

cc: National Labor Relations Board
Office of the General Counsel
Attention: Marcel Mallet-Prevost, Esq. (2 copies)
Assistant General Counsel
Washington, D. C. 20570

cc: Mr. Hugh E. Sperry, Director (1 copy)
Seventeenth Region, National Labor Relations Board
1200 Rialto Building
906 Grand Avenue
Kansas City, Missouri 64106

6. *Proposed Decree of Petitioner (R. 39-40).*

(Filed November 26, 1965, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

Independent Stave Company, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
} No. 17,810.

Decree (as proposed by Petitioner).

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as interpreted by this Court. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964, directed against petitioner, its officers, agents, successors and assigns be and hereby is modified by

(1) Substituting for paragraph 1 (b) of the Board's order the following:

(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO, in order to forestall collective bargaining with said International Union with respect to conditions in effect on and after the date of this order; provided, however, that nothing herein shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder or any defenses thereto by the Respondent;

(2) By substituting the following for the second paragraph of the notice constituting Appendix A of said order:

We Will Not perform or give effect to our agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO, in order to forestall collective bargaining with said International union about any present or future wages, hours or conditions of employment; provided, however, that nothing herein shall require us to vary or abandon any wage, hour, seniority or other substantive feature of our relations with our employees which we have established in the performance of this agreement, or to prejudice the assertion by employees of any rights they acquired thereunder or to prejudice the assertion by us of any defenses thereto;

and it is hereby further

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964,

directed against Petitioner, its officers, agents, successors, and assigns, as so modified, be enforced, and that Independent Stave Company, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board contained in said order as herein modified.

Dated:

7. *The Decree of the Court of Appeals (R. 44).*

(Filed in U. S. Court of Appeals, Dec. 15, 1965.)

United States Court of Appeals for the Eighth Circuit.

Independent Stave Company, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
} No.17810.

Decree.

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964,

as interpreted by the Court of Appeals in its opinion dated November 10, 1965, directed against Petitioner, its officers, agents, successors, and assigns be enforced, and that Independent Stave Company, Inc., its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

Dated: December 15, 1965.

APPENDIX C.

1. *Extracts From Petitioner's Brief Filed in the Court of Appeals on April 8, 1965, Showing That the First Question Presented Was Argued to That Court.*

Statement of the Case.

* * * * * * *

[10] The parties reached tentative agreement on the basis of the Company's offer, and the Local officers agreed to accept the offer but indicated their desire to submit it to the members of Local 42 for their approval (R. 127, 91 and see 142, 207).

Argument.

* * * * * * *

[47] B. **The Record as a Whole Clearly Demonstrates That Local 42 Had Both Actual and Apparent Authority to Negotiate an Agreement With the Employer.**

The record shows that the bargaining history, the conduct of the International, and the provisions of Section 85 of the International Constitution gave the Local authority and apparent authority to negotiate an agreement with the Company. It further shows, without contradiction, that no limitations on the Local's authority to negotiate were communicated to the Employer until after the nego-
[48] tiations were concluded, concessions were made, and agreement was reached. The International's telegram of July 16 merely confirmed the Local's authority to negotiate and, in any event, arrived after agreement had been reached and was therefore too late to work an effective repudiation of the Local's authority. The Board was, therefore, in error in concluding that the 1963 agreement was not binding on the International and that Employer had wrongfully refused to bargain.

The Trial Examiner's discussion of the authority and apparent authority of the Local contains numerous errors (R. 223-226). First, he ignores most of the evidence which establishes the authority, both actual and apparent, of the Local. Second, he misinterprets Section 85 of the International Constitution perhaps because he gives it only perfunctory treatment due to his conclusion that the provisions of the Constitution are "a purely internal union matter" which the Company cannot raise as a defense to a refusal to bargain charge (R. 224). Third, the Trial Examiner totally misinterprets the purpose, intention, and effect of the International's telegram of July 16 (R. 225). Fourth, the Trial Examiner erroneously equates the International's power to revoke the Local's authority during negotiations with a power to repudiate an agreement already negotiated by it merely because the agreement had not yet been ratified by the members of the Local, reduced to writing, and executed (R. 225). Finally, the Trial Examiner is palpably in error in holding that the International could properly reject the contract on August 1, 1963 and that it was then able to "reassert" its statutory right to bargain (R. 225). There can be no doubt that even if it had not abandoned its bargaining status completely and did retain the power to revoke authority it had delegated to the Local, it could no longer revoke that authority once the agreement had been ratified by the members and executed.

[49] The facts which have been discussed in detail in the preceding argument show that the International agreed that the Local should be the sole party to each of the collective bargaining agreements executed by the Company since the 1955 certification. These contracts further show that the Local, not the International, administered the contracts and processed grievances. Many other facts advanced in the estoppel and abandonment argument, above, indicate the actual authority and apparent authority of the Local as well. See, **Ingalls Shipbuilding Corp.**, 143

N. L. R. B. 712, 712-713 (1963), for a Board conclusion finding authority, estoppel and succession to bargaining status on similar facts.

In many cases the Board and the courts have held that apparent authority, established by facts similar to those in the case at bar, cannot be repudiated subsequent to the conclusion of negotiations and results in Union responsibility for the acts of those apparently authorized. E. g., **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, 123 N. L. R. B. 922 (1959); **International Union, U. A. W. (Maremont Automotive Products, Inc.)**, 134 N. L. R. B. 1337 (1961); **Sheetmetal Workers Union, Local 65, A. F. L.-C. I. O. (Inland Steel Products Company)**, 120 N. L. R. B. 1678 (1958); **The Texas Company**, 112 N. L. R. B. 169, 170 (1955); **International Longshoremen's Union (Sunset Line and Twine Company)**, 79 N. L. R. B. 1487 (1948); **McLeod v. Local 27, Paper Products Chauffeurs, I .B. T.**, 212 F. Supp. 57, 64 (E. D. N. Y. 1962); cf., **N. L. R. B. v. Local 815, I. B. T.**, 290 F. 2d 99, 104 (2d Cir. 1961), and see Section 2 (13) of the Act, 29 U. S. C., § 152 (13). The Trial Examiner recognizes this principle, but ignores the numerous uncontradicted facts compelling its application to the instant proceeding (R. 224).

* * * * * * *

]60] It is apparent, therefore, that, even if none of the other evidences of authority was considered, Section 85 alone created authority in the Local to negotiate the agreement and that no limitations on this authority was communicated to the Company, at least prior to July 16, 1963. Where restrictions on the Union negotiators' authority are not effectively communicated to the Company, the International cannot later repudiate the contract arrived at in negotiations with them. **International Union, U. A. W. (Maremont Automotive Products, Inc.)**, 134 N. L. R. B. 1337 (1961), **Sheetmetal Workers Union, Local 65, AFL-**

CIO (Inland Steel Products Company), 120 N. L. R. B. 1678 (1958). In the **Inland Steel Products** case, the Board held that restrictions in the bylaws of a local not communicated to the Company negotiators could not restrict the Union negotiators' authority. *Id.* at 1679.

* * * * * * * *

[64] The third point relied upon by the Trial Examiner to show that the Local's authority was revoked to the Company's knowledge prior to the execution of the agreement was the telegram sent by the International on July 16, 1963. This telegram was ineffective to serve that purpose for two reasons: (1) the telegram confirmed, rather than revoked, the Local's authority to negotiate, and (2) it was too late to revoke the Local's authority because tentative agreement, subject only to Local membership ratification, had already been reached.

* * * * * * * *

[65] Moreover, once the Company had made substantial concessions and reached tentative agreement with the Local officers subject only to the ratification by the mem-
[66] bers of Local 42, no notification by the International that the Local negotiators lacked authority could be effective to repudiate the agreement already reached. The International was bound by the contract subject only to the possibility of being relieved from its obligation in the event of the failure of the Local membership to ratify the agreement. **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, 123 N. L. R. B. 922, 929 (1959); cf., **N. L. R. B. v. Winchester Electronics, Incorporated**, 295 F. 2d 288 (2d Cir. 1961) (attempted employer repudiation after negotiation but prior to signing). The fact that contract remained to be ratified on July 16 would not allow the International to repudiate it for any reason other than the failure of the Local to approve it. **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, *supra*; **The Texas Company**, 112 N. L. R. B.

169 (1955); **McLeod v. Local 27, Paper Products Chauffeurs, I. B. T.**, 212 F. Supp. 57 (E. D. N. Y. 1962); cf., **North Country Motors, Ltd.**, 146 N. L. R. B. No. 82, 55 L. R. R. M. 1421 (1964).

The agreement was ratified by the overwhelming majority of the Local and was signed by the local union officials and the Company on July 18, 1963 (R. 79, 91, 94, 109, 114-120, 221). It is obvious that, the Trial Examiner notwithstanding, the International was in no position to "reassert" its bargaining authority on August 1. The contract had been signed and was irrevocably binding on all parties.

For all of these reasons, the Trial Examiner and the Board erred in holding that the Local did not have actual authority and apparent authority and that such authority, if it existed, was revoked in time to render the July 18 agreement ineffective. Since there was a binding contract between the parties, the Board erred in finding the Employer guilty of a refusal to bargain in good faith. The Board's order should be set aside.

2. *Extracts From Petitioner's Reply Brief Filed in the Court of Appeals on May 7, 1965, Showing That the First Question Presented Was Argued to That Court.*

[1] I. **TWO FUNDAMENTAL MISCONCEPTIONS UNDERLIE THE BOARD'S BRIEF.**

* * * * * * * *

[3] B. **The Company and the Local Had Reached Agreement Prior to April 16, 1963, Subject Only to Ratification by the Members of the Local.**

In its Brief the Company repeatedly pointed out that tentative agreement was reached between the Company and the Local officers at the conclusion of the negotiations on July 13 and prior to the receipt of the July 16 telegram; that all that then remained was ratification by

the members of the Local and execution of a contract document embodying the agreement (Pet. Br. 10, 48, 61-2, 63, 64, 65-6). The evidence clearly indicates that such was in fact the case (R. 127, 90-91, 102, 142, 207). Nevertheless, the Board proceeds as if there were merely an open, unaccepted Company offer on July 16. There is a major distinction between allowing the International to revoke bargaining authority during negotiations and allowing it to repudiate an agreement duly negotiated by its agents [4] when all that remains is the execution of the agreement so reached. The Company specifically excepted to the Trial Examiner's failure to make this distinction (Par. 3, R. 231). Yet the Board's Brief in this Court, like its Decision and Order, simply ignores these facts and this distinction (R. 233-4, NLRB Br. 4-5, 17-18, 19, 28). As the Company has pointed out, citing numerous authorities, no attempted repudiation or limitation on the Local's authority could be effective unless it was received prior to the agreement of the Local officers to accept the Company proposal when ratified by the membership (Pet. Br. 47-9, 58-9, 60, 65-6). The Board cites numerous cases to establish the proposition that it need not specifically discuss each piece of evidence bearing on a disputed issue of fact (NLRB Br. 23 n. 5). The Board's silence on this vital issue may not, however, be passed off as a mere failure to discuss all of the conflicting evidence on an issue determined by the Board. In its Brief, the Board's attempted distinction of **Sheetmetal Workers**, 120 NLRB 1678 (1958), gives some indication that the General Counsel believes that communications limiting the bargaining agents' authority are effective unless the agreement has been reduced to writing before notice of such limitations is received by the Company (NLRB Br. 22-3). But this Court cannot determine from the Board's Decision and Order whether the Board questioned the facts—that tentative agreement subject only to ratification had been reached—or the law—that such an agreement could law-

fully be repudiated. "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action. . . .'" **N. L. R. B. v. Metropolitan Life Ins. Co.,**— U. S. —, 13 L. ed. 2d 951, 955 (1965). The Board may not frustrate judicial review by hiding behind "unarticulated bases of decision." *Id.*, 13 L. ed. 2d at 954-5. The absense of Board findings with respect to the existence and legal significance of the verbal agreement is a fatal defect [5] in the Board's Decision and Order in this case. *Cf.*, **Textile Workers v. Darlington Manufacturing Company,** — U. S. —, 13 L. ed. 2d 827, 837 (1965).

> "The compelling conclusion is that the Board has failed to 'disclose the basis of its order' and to 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 197, 85 L. ed. 1271, 1284. . . ." **American Ship Building Co. v. N. L. R. B.,** — U. S. —, 13 L. ed. 855, 869 (1965) (concurring opinion), **N. L. R. B. v. Metropolitan Life Ins. Co.** *supra*, 13 L. ed. 2d at 955.

Under these circumstances the Board's order should not be enforced.

II. THE BOARD HAS GROSSLY DISTORTED THE FACTS.

* * * * * * *

[7] 4. The Board states:

> ". . . When the Union learned of the **pending** agreement, it informed the Company [by its July 16 telegram] that the Local had no authority to execute **such** a contract" (NLRB Br. 19) (Emphasis added).

As previously indicated on July 16 the agreement was no longer "pending"; it had been concluded subject only to ratification by the members of the Local and final execution (R. 127, 91, 102, 142, 207). Moreover, the telegram

merely referred to Section 85 which gives the International the power to disapprove only contracts calling for substandard wages and working conditions. Nothing in the telegram indicated to the Local or the Company that the International viewed the 1963 contract as substandard or that it objected to that contract for any other reason (R. 90). It was only on August 1, long after execution of the contract, that the International by letter indicated its disapproval of the 1963 contract "by reason of substandard provisions thereof" (R. 124-5).

• • • • • • • •

[13] IV. **THE COMPANY NEED NOT SHOW THE LOCAL HAD "UNLIMITED AUTHORITY."**

The Board argues that the Company must demonstrate that the Local had "unlimited authority" (NLRB Br. 7, 16, 17-18). The Board, however, fails to recognize that it is sufficient for the Company to show that the Local had authority or apparent authority to negotiate the 1963 contract and that such authority was neither revoked nor limitations on it communicated to the Company until after negotiations, which the International knew were in progress, were concluded and agreement reached. The Board's own cases support the Company in this position (NLRB Br. 7, 18). Thus, **N. L. R. B. v. Acme Mattress Co., Inc.**, 192 F. 2d 524, 527 (7th Cir. 1951), held the International responsible for the actions of a person held out by it as its negotiator where "[n]o limitation was communicated to the Company with respect to Cline's [the negotiator's] apparent authority to impart to the Com-
[14] pany the terms and conditions upon which the International would execute the contract . . .", and **N. L. R. B. v. I. B. T., Local 182**, 228 F. 2d 83, 84 (2d Cir. 1955) held the union responsible for the "implied authority" of an acting steward.

• • • • • • • •

APPENDIX D.

1. *Conflicting Opinion of the United States Court of Appeals for the Ninth Circuit on the Propriety of Paragraph 1 (b) of the Board's Order (353 F. 2d 667).*

National Labor Relations Board,
Petitioner,

v.

Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento,
Respondent.

No. 19803.

United States Court of Appeals,
Ninth Circuit.

Dec. 2, 1965.

Rehearing Denied Jan. 7, 1966.

Before Chambers and Koelsch, Circuit Judges, and Thompson, District Judge.

Thompson, District Judge:

Effective April 1, 1961, the union P. C. B. C. E., Inc., and Respondent, Golden State Bottling Company, Inc., entered into a collective bargaining agreement covering all non-supervisory employees at the Sacramento, California plant of Golden State Bottling Company, Inc. Membership in the union was limited to employees of Golden State and it was independently operated and controlled. The agreement contained a provision for annual termination on notice.[1]

[1] "This agreement shall be effective as of the 1st day of April, 1961, and shall continue in effect until the 31st day of March, 1962, and from year to year thereafter, unless terminated by either party giving written notice of termination to the other party not less than sixty days, nor more than 120 days, prior to the anniversary date of the contract."

It was renewed in writing on March 31, 1962 with a 12½ cents per hour increase in wages. In January, 1963, the union sent timely notice to Golden State demanding negotiations for a new contract.

Negotiations commenced early in March and bargaining continued to the end of the month. No agreement was reached and the negotiations were deadlocked. At the last union meeting, the employer's proposals were rejected by the union by a tie vote and the employees who rejected the contract signed cards to solicit the Teamsters Union as the bargaining agent. When the employees reported for work the morning of April 1, they were called together by Schilling, the General Manager of Golden State, and informed that they would not be permitted to work without a contract. He renewed his proposal, stating that it was his best and final offer, and requested the employees to accept it.

At this point, the union members, disagreeing among themselves about what to do, split into two groups. The smaller group of ten, led by Wagner and by Baker, who was actively promoting the Teamsters Union, and including all the union's duly elected officers, left the plant and milled around outside the gate. The remaining fourteen employees were once again given the company's final offer, told that they could not work without a contract, and informed that they could not hold meetings on company property. It was also suggested that there would have to be officers to sign the contract. These employees adjourned to an adjacent alley and one them conferred with the union attorney by telephone and received advice that they could hold a meeting and elect new officers. They agreed to accept the company offer and elected new officers who signed the contract for the union. The attorney's advice appears to have been in conflict with the union's Constitution and by-laws respecting notices of meetings, although

Baker's group was informed of what was going on by members who went back and forth between the two groups.

Of the ten employees who left the plant, all but Baker and Wagner returned to work the same day. Wagner returned to work the next day, April 2, and Baker returned to work on April 3. Thus, all employees eventually accepted the contract terms.

On August 16, 1963, Baker was fired, purportedly for having been caught taking unauthorized time off to purchase football tickets. There had been intervening conversations between Schilling and Baker in which it was suggested that Baker find work elsewhere and Schilling had stated that the March and April incidents had not been forgotten.

As a result of the foregoing, unfair labor practice charges were filed against Respondent. After a hearing and a decision by the trial examiner, the Board made the following findings and conclusions:

> "We find, as did the trial examiner, that the Respondent violated Section 8 (a) (3) and (1) of the Act by denying employment to Wagner on April 1, 1963, and to Baker on April 1 and 2, 1963, because they declined to sign the Respondent's contract proposal as officers of the incumbent union, P. C. B. C. E., Inc., hereinafter referred to as Union. We further find that the Respondent violated those Sections of the Act by discharging Baker on August 16 because of his said activity in April and his attempt to interest the employees in joining the International Brotherhood of Teamsters.
>
> "The Trial Examiner concluded that the Respondent, by its conduct on April 1 in conditioning continued employment of all its employees upon their acceptance of the Respondent's contract offer and

> forcing the employees to elect new officers to sign that contract, dominated the administration of the Union in violation of Section 8 (a) (2) and (1) of the Act. We agree that the Respondent thereby interfered with the administration of the Union in violation of Section 8 (a) (2) and (1) of the Act, but conclude that those acts did not constitute domination of that organization within the meaning of Section 8 (a) (2)."

The Board, in addition to ordering Respondent to withdraw recognition from the union temporarily and to reinstate Baker with back pay, and to reimburse Wagner for loss of one day's wages, ordered Respondent to cease and desist from (a) interfering with the administration of the union or any other labor organization; (b) recognizing anyone but the duly elected union bargaining agent for the purpose of collective bargaining; (c) bargaining with the union until it has been certified as exclusive representative by the National Labor Relations Board; (d) giving effect to the April 1 contract; and (e) discharging, witholding or threatening to withhold employment from any employee for the purpose of compelling him or his bargaining agent to yield to Respondent's contract proposals. The Board then instituted this action by filing a petition for enforcement of its Order.

We affirm the finding that Respondent violated Section 8 (a) (3) and (1) of the Act by firing Baker on August 16, 1963. There is, in the record considered as a whole, substantial evidence to support the Board's finding that Baker's discharge was motivated by his past union activities on behalf of the Teamsters. National Labor Relations Board v. Sellers (9 CCA 1965), 346 F. 2d 625.

The remaining findings of unfair labor practices stem substantially from the April 1 lockout by Golden State. In American Ship Building Company v. National Labor Relations Board, 380 U. S. 300, 85 S. Ct. 955, 13 L. Ed.

2d 855 (1965), decided after the Board's decision here, the Supreme Court held that a lockout by an employer used as a means of bringing pressure on his employees in support of his bargaining position does not violate Section 8 (a) (3) and (1) unless there exists a supportable finding of unlawful intent on the part of the employer to injure a labor organization or to evade his duty to bargain collectively, or to discourage union membership.

We do not think that the rationale of the American Ship Building case is inapplicable merely because of the charges here under Section 8 (a) (2), proscribing employer domination and interference with union administration, which were not present in that case. True, the effect of this lockout was to disrupt the orderly internal functioning of the union, but this result of an otherwise lawful act cannot make that act an unfair labor practice. This was not a necessary consequence of the lockout and the employer's refusal of work did not necessarily destroy the union's capacity for effective and responsible representation.

The Board's characterization of the events of April 1, 1963 as interference with the administration of the union is based on the fact that the union split into two factions and that one of these factions promptly backed away from the union's earlier position and decided to accept the company's proposal. This seems to us to be simply a possible result of a legal lockout. In the absence of evidence that the employer was wrongfully motivated in the exercise of his right to refuse work or that union disruption was a necessary consequence thereof, we cannot sustain the view that the lockout was an unfair labor practice.

The Board found violations of Section 8 (a) (1) and (3) in the denial of work to Wagner and Baker on April 1 and 2 because they refused to sign the contract as officers of the union. There is no evidence to support this finding.

Denial of work to Wagner and Baker was merely part of the general lockout and they were treated no differently than other employees.

The Board also found violations of Section 8 (a) (1) and (2) in that the company conditioned continued employment on the employees' acceptance of the contract and "forced" them to elect new officers to sign the contract. To repeat, the conditioning of all work upon acceptance of the contract is the very essence of a lockout which, as a matter of law, cannot be an unfair labor practice without a finding of proscribed intent or necessary destruction of the union's capacity for responsible and effective representation. There is no such finding here, nor could one be made on this record. There was testimony, accepted by the Board, that Schilling told the union majority to hold an election of new officers so that there would be someone to sign the contract. This falls short of forcing an election since the men were out of the company plant on their own before the election was held and sought and received the advice of their own attorney.

It was, nevertheless, inappropriate in these circumstances for Schilling, with full knowledge of the union split, to tell one of the groups what to do, and to this extent, the record sustains the Board's finding that he interfered with the administration of the union. Schilling sought the bargaining benefits of a lockout but was unwilling to assume the burdens. His whole course of conduct on April 1 demonstrates an unwillingness for the plant to be shut down and an avid desire to do anything to keep it operating despite the proclaimed lockout. The legal course open to him was to hire temporary replacements for the locked out employees. Labor Board v. Brown, 1965, 380 U. S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839. His duty was to leave the union alone to work out its own destiny. It was an unfair labor practice for him to bargain with the remaining employees, none of whom, by

chance, was a member of the authorized bargaining committee for the union, and his suggestion that new officers be elected, while clearly an interference with the administration of the union under the circumstances of economic compulsion inherent in the lockout, serves also to aggravate the impropriety of his dealing at all with a splinter group.

One paragraph of the Board's Order which we will not enforce deserves special comment. Paragraph 1 (d) enjoins the company from:

> "Performing, enforcing, or giving effect to the contract with P. C. B. C. E., Inc., dated April 1, 1963, or any supplement or renewal thereof; **Provided, however,** that nothing herein shall be construed to require the Respondent to vary any substantive provision of such agreement, or to prejudice the assertion by the employees of any rights they have thereunder."

We fail to see how the company can cease and desist from performing or enforcing the contract while at the same time allowing the assertion of employee rights thereunder. We refuse to direct such one-sided enforcement.

The Board's Order is enforced in conformity with this opinion.

2. *Extract From the Board's Petition for Rehearing in NLRB v. Golden State Bottling Company (Denied January 7, 1966) Relating to the Propriety of the Board's Order.*

[4] 3. The portion of the Board's order dealing with the contract between the Company and the Independent Union (Paragraph 1 (d)) is intended to permit the Company to maintain working conditions now in effect while prohibiting it from treating them as contractually imposed. The purpose of this provision, which was not

challenged by the Company (**Marshall Field & Co. v. N. L. R. B.**, 318 U. S. 253), is to effectuate the withdrawal of recognition from the Independent Union, for an appropriate time, without compelling the Company to withdraw benefits in the name of compliance with the Board's order. See, **National Licorice Co. v. N. L. R. B.**, 309 U. S. 350, 365; **J. I. Case v. N. L. R. B.**, 321 U. S. 332, 340-342; **I. L. G. W. U. v. N. L. R. B.**, 366 U. S. 731, 735, n. 7; **N. L. R. B. v. Wemyss**, 212 F. 2d 465, 472, 473-474 (C. A. 9); **Independent Stave Co., Inc. v. N. L. R. B.**, ... F. 2d ... (C. A. 8), November 10, 1965, 60 LRRM 2406, 2413, 52 L. C. Para. 16, 729. If, as the Court found (slip op., p. 6), paragraph 1 (d) of the Board's order is ambiguous, we submit that the Court should have remanded that portion of the order to the Board for clarification, instead of denying enforcement and thereby permitting respondent to continue to maintain a contract which the Court found was obtained through unlawful means.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1212

INDEPENDENT STAVE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-37) is not yet officially reported. The Board's decision and order (R. 217-230, 233-236) are reported at 148 N.L.R.B. 431.

JURISDICTION

The decree of the court of appeals (Pet. 51-52) was entered on December 15, 1965. A petition for

rehearing was denied on February 8, 1966 (Pet. 2). The petition for certiorari was filed on April 13, 1966. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence in support of the Board's finding that the employer violated its collective bargaining obligation to the certified international union by executing, with one of the union's locals, a contract which the international had rejected, and by refusing to bargain further with the international.

2. Whether the remedy prescribed by the Board was proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 3-4 of the petition.

STATEMENT

In September 1955, Coopers International Union of North America, AFL-CIO, was certified by the National Labor Relations Board as the representative of certain employees of the Independent Stave Company, a manufacturer of barrels. Thereafter, the international negotiated with the company about wages, hours, and working conditions of the employees represented by it; Local 42, affiliated with the international, participated in these negotiations. (R. 219, 224-224.)

On June 26, 1963, the company met with George Calvert, a representative of the international, and officers of Local 42 to negotiate a new contract (R. 219; 29, 86). Proposals presented by the international were discussed, but no agreement was reached (R. 219; 30). A second meeting was held on July 11 to review further the international's proposals (R. 219-220; 30). In both meetings, Calvert was the principal spokesman for the employees (R. 219-220; 32). At the close of the July 11 meeting, it was agreed to meet again the next day to discuss only the non-monetary clauses of the proposed contract (R. 220; 30, 52-53, 97).

On the morning of July 12, Dean Rhoten, the president of Local 42, and other members of the local's bargaining committee informed Calvert that Local 42 desired to submit to the company a lower wage proposal than had previously been made.[1] Calvert pointed out that such a proposal had been rejected by the international's executive board before negotiations had begun. When Rhoten persisted, Calvert, after checking with the international's president, Doyle, by phone, stated that he was not authorized by the international to negotiate on that basis. He told Rhoten to so inform the company and state that he would not attend the bargaining session that day. (R. 220; 31, 47, 88.)

At that session, Rhoten told the company that there had been a "disagreement" between the inter-

[1] During this conference, the company's attorney called Calvert to inform him that the next scheduled meeting would be held in the plant instead of in his office (R. 46).

national and the local, that Calvert would not attend the meeting, and that the company was now "dealing" with the local (R. 220-221; 89, 97). The company's president responded that such an arrangement was "fine with him" (R. 221; 97). The company then made what it described as its "final offer" to the local's bargaining committee. Although only non-monetary items were to have been discussed at this meeting, the company's offer included monetary items. (R. 221; 102.) On July 15, the company notified the local by letter that it had until July 18 to accept or reject the final offer (R. 221; 108, 76). The company did not send a copy of the letter, or of its final offer, to the international (R. 222; 32).

On July 16, the international sent a telegram to the company's president and attorney and to Rhoten advising them that under the international's constitution "no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board" (R. 221; 124, 39-40, 54).[2] Rhoten discussed this telegram with the company's attorney, who suggested that the contract be signed because Calvert had "walked out" (R. 221; 90). On July 18, the contract was signed by Local 42 and the company. A space for the signature of the international's representative, Calvert, was provided. (R. 221; 79.)

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[2] Section 85 of the international's constitution authorizes its locals to make their own collective bargaining agreements, but states that such contracts are subject to the approval of the international's general executive board (R. 224; 34).

On July 21 or 22, Rhoten, at the company's suggestion, presented the contract to Calvert. This was the first knowledge that the international had that an agreement had been executed. (R. 221-222; 32, 91-92.) Calvert refused to sign, but agreed to forward the contract to the international's executive board (R. 222; 120, 32-33), which on August 1 rejected the agreement and so informed the company by letter (R. 222; 41, 55). In the same letter, the international's president requested the company to meet with international representatives "for the purpose of resumption of negotiations for a collective bargaining agreement covering" the company's employees (R. 222; 124-125). The company replied that in view of Calvert's failure to attend the July 12 meeting the international was unreasonable in demanding resumption of bargaining sessions (R. 222; 126-127, 59, 82). Later, when Calvert and the union's attorney sought to arrange a meeting with the company's president, the latter's receptionist informed them that "Mr. Boswell [the president] will not see you at all" (R. 222-223; 33).

The Board found that the international was at all times the bargaining representative of the company's employees; that it never delegated to Local 42 the power to bind it by contract without its approval; and that, in any event, the international made clear to the company before execution of the 1963 contract that Local 42 had no authority to speak for the international. The Board concluded that the company had violated Sections 8(a)(5) and (1) of the Act by entering into a contract with Local 42 and by refus-

ing to bargain further with the international (R. 224-226). It ordered the company to cease and desist from giving effect to its 1963 agreement with Local 42 and from refusing to bargain with the international, and to bargain on request with the international (R. 227-228, 234). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. 19-37).

ARGUMENT

1. Petitioner asks this Court to decide whether it is a violation of Section 2(13) of the National Labor Relations Act (which provides that neither actual authorization nor subsequent ratification shall be controlling in determining whether an agency relation has been established) for an international union to limit the negotiating authority of its local *after* the local has already reached an agreement with the employer (Pet. 3, 11-12). That issue, however, is not presented by the facts of this case, which—as petitioner itself acknowledges—"are almost unique" (Pet. 11). The Board found (*supra*, p. 5), and the court of appeals agreed (Pet. 31-32), that the international had never authorized Local 42 to negotiate a contract on its own, and that the company was at all times aware that any agreement reached was subject to the approval of the international.[3] Since the international,

[3] As the court below pointed out (Pet. 31):

> The petitioner, recognizing International's status as the sole bargaining agent, called Calvert on the morning of July 12, 1963, to notify him of a change in the meeting place for the scheduled negotiating session. * * * Peti-

not the local, was the certified bargaining representative, and since the international neither actually nor apparently delegated its representational duties to the local, the Board properly concluded that the company violated Sections 8(a)(5) and (1) of the Act (dealing with refusals to bargain collectively and interference with employees' rights) by negotiating a contract with Local 42 and by refusing to bargain further with the international. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678.

2. There is no merit to petitioner's contention (Pet. 14-18) that the Board exceeded its remedial authority in requiring the company to cease giving effect to the contract with Local 42. Since the core of the refusal to bargain was the company's action in entering into a contract with Local 42 which the international had rejected, it was clearly appropriate for the Board to require that the company not only bargain with the

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tioner was well aware of the disagreement over wage demands between Calvert and Local 42 as being the reason why Calvert did not attend the July 12th meeting, which incidentally, was originally scheduled to deal only with non-monetary matters. Petitioner also ignored Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless and until the terms of the agreement were first approved by International. In spite of the warning, petitioner, two days later on July 18th, entered into the agreement now in question. Petitioner asked that the officers of Local 42 forward a copy thereof to International. The fact that the agreement contained a place for Calvert's signature is an indication that petitioner realized International had not abandoned its status as bargaining agent for petitioner's employees. * * *

international on request but so bargain free from any commitments or restraints imposed by the improper contract with Local 42. It was equally appropriate for the Board to make plain in its order that the company, while obliged forthwith to negotiate with the international for a new contract, was not thereby free in the meantime to alter unilaterally the terms and conditions of employment that had been established for its employees as a result of the existing contract. Order provisions of this type are clearly reasonable and have been uniformly sustained by this and other courts. *E.g.*, *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 364-365; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 340-342;[4] *Garment Workers* v. *National Labor Relations Board*, 366 U.S. 731, 735, n. 7, enforcing 122 N.L.R.B. 1289, 1295; *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 246 (C.A. 7), certiorari denied, 320 U.S. 746.[5]

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[4] Although the order in *J. I. Case, supra,* contained more qualifications than the order in this case, the violation there was more limited. The making of the individual contracts was not itself unlawful; the violation was in using the contracts to defeat the employees' rights of self-organization (321 U.S. at 333-334). Here, on the other hand, the execution of the contract with Local 42 constituted the central element of the unlawful refusal to bargain.

[5] *National Labor Relations Board* v. *Golden State Bottling Co.*, 353 F. 2d 667 (C.A. 9), is indeed contrary to these authorities; but that case is presently pending before the Ninth Circuit on the Board's petition for rehearing, on both the remedy and another point, the court of appeals having on April 5, 1966, vacated its earlier order denying rehearing and granted the parties leave to file briefs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1212.

INDEPENDENT STAVE COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

I. Reply to Point 1.

1. Apparently conceding that the issue posed by petitioner—whether an International union can limit the negotiating authority of its Local after the Local has already reached agreement with the company—represents such a fundamental departure from established agency principles with such grave implications for stable col-

lective bargaining as to be worthy of this Court's attention—the government attempts avoid the grant of the writ by declaring that this issue is not presented at all! This effort at obfuscation is performed in one all-important sentence: "The Board found (*supra*, p. 5) and the court of appeals agreed (Pet. 31-32), that the international had never authorized Local 42 to negotiate a contract on its own, and that the company was **at all times aware** that any agreement reached was subject to the approval of the international" (Br. 6) (Emphasis added). It is clear, however, that the Board did not make any such finding that the company was aware of a requirement for International approval at the time the agreement was entered into, and that the Board and the Court of Appeals both relied on the untimely telegram of July 16 in approving the International's rejection of the contract. The issue posed by petitioner is presented in this record.

2. First, it is significant that the government quotes only the court and not the Board (Br. 6). As its Brief indicates (p. 5) the Trial Examiner and the Board found **only** that the limitations on the Local's authority were communicated to the company "before **execution** of the 1963 labor contract" on July 18. Moreover, the Board relied on the belated July 16 telegram in making this finding (A. R. 225). There was no finding that the company was "at all times" aware of any such limitation—much less that the company was aware of the requirement of International approval on July 13 when it entered into the agreement with the Local.

3. Second, while it is of course true that the Court of Appeals may not make its own findings and enforce a Board order on a basis other than that found by the Board, even the portion of the Court's opinion quoted by the Board (Br. 6-7, n. 3) does not constitute a finding by the Court that the company was "at all times" aware

of a limitation on the Local's authority. It is clear that the Court did not attempt to determine what the company's knowledge was on July 13, 1963. Indeed, the Court (Pet. 31) found that the contract was "entered into" on July 18, while the Board found only that the contract was "executed" on that date (A. R. 221, 225, 226). Moreover, the Court relied on the July 16 telegram and if—as apparently all concede[1]—that telegram arrived after agreement was reached subject to ratification, it was obviously improper for the court to rely on it in upholding the Board's failure to bargain finding. This impropriety rests on the very issue tendered by petitioner: that a union may not limit its negotiators' authority when agreement has already been reached subject only to employee ratification. The July 16 telegram which arrived after agreement was reached on July 13 but before execution on July 18 was clearly untimely and should not have been considered by the Board or the court in determining whether Local 42 had apparent authority.

4. Moreover, the government's asertion that the Board and the Court found that the company was "at all times" aware of the Local's limited bargaining authority flies in the face of uncontradicted evidence that the Local, not the International, was the party to every contract negotiated by the company from 1955 on (A. R. 67, 249, 68, 252, 5, 237, 241, 244); that the International did not sign or ap-

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[1] As the charging party in its Brief before the Trial Examiner, p. 3, declared: "On July 13 representatives of [the company] again met with representatives of Local 42. At this meeting the parties agreed to the terms and conditions of the agreement dated July 16, 1963 [actually July 18], subject to the approval of the membership of Local 42. On July 17, 1963 the Union, by telegram, advised [the company] that the purported agreement with Local 42 was of no force and effect and demanded that [the company] bargain with the Union. Subsequent to the receipt of this telegram representatives of [the company] and Local 42 on July 18, 1963 executed the agreement in the office of the President of [the company]."

prove the 1957 contract (A. R. 67-8, 69, 71-72, 224, 252, 258); that the International Vice President's signature line on the 1963 contract indicated simply that he was signing as one of Local 42's negotiators in the 1963 bargaining sessions (A. R. 110, 113, 114, 120, compare 249); that International President Boyle had at no time prior to July 16 advised the Company of any limitation on the Local's authority to bargain because "I didn't think it was necessary" (A. R. 66); that International Vice-President Calvert testified similarly that the company was not advised of any such limitation, that he knew of the July 12 bargaining session, advised the Local officers of the changed meeting place and conferred with them at noon as to progress in the negotiations without ever objecting to the company negotiating with the Local (A. R. 47); and that company President Boswell thought he was bound to negotiate with Local 42 (A. R. 85). Clearly, without the July 16 telegram, the Board's finding that the Local lacked apparent authority is based solely on highly ambiguous facts, conjecture and surmise. The timeliness and effect of the July 16 telegram is without question the cruical issue presented by this record, and the action by the Board in this case indicates that the Board believes any union limitation on its negotiators' authority prior to execution of an agreement is effective.[2]

II. Reply to Point 2.

1. Government counsel attempt to justify the Board's failure to include in paragraph 1 (b) the limitations which

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[2] As the Board argued in its Brief before the Court of Appeals, pp. 22-3, in attempting to distinguish **Sheet Metal Workers**, 120 NLRB 1678, 1689, from this case: "[In Sheet Metal Workers] [t]he identical procedure had been followed in 1956 as in 1954 and 1955—that is, agreement was reached, the employees approved the agreement, and the agreement was reduced to writing. **It was only after the final step** in the 1956 negotiations that the employer learned of the new limitations on the agent's power." (Emphasis added.)

this Court imposed upon a virtually identical order in **J. I. Case Co. v. NLRB**, 321 U. S. 332, 340-342 (1944), by distinguishing between lawful individual contracts which have been used to violate the Act and the contract with Local 42, here, which the Board held was both unlawfully executed and used to forestall collective bargaining (Br. 8, n. 4). Not only does no Board case of which we are aware recognize this purported distinction, but no reason is suggested why the **Case** limitations—that the Board has jurisdiction to abrogate a contract only to the extent necessary to remedy an unfair labor practice and that employee contract rights may not be preserved without also preserving employer defenses thereto—are not equally applicable whether it is an individual, or a collective agreement which the Board is condemning.[3]

> "Certainly the Board in its administration of the Act, has broad discretion in shaping remedies. However, the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally." **Burinskas v. NLRB**, 357 F. 2d 822, 827 (D. C. Cir. 1966).

The Board has here arbitrarily used a blunderbus where a rapier was called for.

2. After advising this Court that remedy provisions like paragraph 1 (b) "have been uniformly sustained" (Br. 8), the government concedes that **NLRB v. Golden State**, 353 F. 2d 667 (9th Cir. 1965), squarely conflicts with decisions requiring enforcement. Contrary to the government's suggestion (Br. 8, n. 5), there is no reason to believe that

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[3] Indeed, in **Western Cartridge Co.**, 44 NLRB 1, 30-1 (1942), **enforced**, 134 F. 2d 240, 246 (7th Cir.), **cert. denied**, 320 U. S. 746 (1943), although it did not utilize the **Case** limitations, the Board gave more elaborate treatment to the individual contracts it invalidated than it did to a collective bargaining agreement which it also voided.

the Ninth Circuit will give any further consideration to the remedy issue in that case. It has already twice rejected the Board's position—in its opinion filed December 2, 1965, denying enforcement to the portion of the Board's order here relevant and in its order of January 7, 1966, denying a petition for rehearing which raised the same points with respect to the remedy as the Board here urges. The Board's motion for reconsideration addressed itself solely to the point that the action of this Court on January 17, 1966, in **Newspaper Drivers v. Detroit Newspaper Publishers**, No. 663, O. T. 1965, showed that the Ninth Circuit had erred in refusing to remand the **Golden State** case to the Board for reconsideration in the light of **American Ship Building v. NLRB**, 380 U. S. 300 (1965). It was this motion which the Ninth Circuit sustained on April 5, 1966, allowing the Board to brief this issue. The Board, however, on April 18, 1966, after the Petition for Certiorari was filed in this case, filed a brief in support of its petition for rehearing in **Golden State** in which it not only briefed the remand question but also attempted to resurrect the remedy issue which had been twice decided against it. There is thus no reason to believe that the Ninth Circuit either intended to, or will give further consideration to its remedy decision.

3. While government counsel now say the purpose of the proviso to paragraph 1 (b) was to make "plain" that the company was not free to alter unilaterally the terms and conditions of employment established under the contract invalidated by the Board (Br. 8), the Eighth Circuit clearly ordered enforcement on the theory that the proviso was intended to preclude any demand by the International for retroactivity (Opinion, Pet. 37). It is indeed ironic that the government here seeks to defend action by the Court below which enforced the Board's order by interpreting it in a manner which denies an important portion of the relief which the Board presumably intended to

award the charging party—the right to seek retroactive benefits.[4]

It is clear that the utter confusion surrounding the frequent and varying use of this remedy by the Board is worthy of this Court's attention . . . or a summary reversal based .on **Case.**

CONCLUSION.

For the foregoing reasons and the reasons stated in the petition itself, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[4] Nor is this issue academic. The International, on April 29, 1966, wrote the company that "In addition to the enclosed proposed Collective Bargaining Agreement, the Union also wishes to advise you that it intends to seek during negotiations retroactive wages and other benefits for the employees pursuant to the Order and Decision of the National Labor Relations Board in Case No. 17-CA-2278."